Supreme Court, U.S.
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No. 93-1844

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

GUSTAVO PIMENTEL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
DIVISION ONE OF THE FOURTH DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED[1]

1. May a trial court determine that a criminal defendant is "in custody" for *Miranda* purposes by considering the interrogating police officers' "disclosed" beliefs to defendant that he was a participant in the homicide?

2. Did the initial non-*Mirandized* confession taint the later *Mirandized* confession if the latter confession were found to have been inextricably connected to the non-*Mirandized* confession, the two being part of but one continuous interrogation?

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[1] Respondent submits the following "Questions Presented" independent of petitioner's, because petitioner inaccurately presents the relevant question to this Court as being similar to one recently decided by this Court in *Stansbury v. California* ____ U.S. ____ (April 26, 1994) [62 U.S.L. Week 4279.]

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, GUSTAVO PIMENTEL, respectfully requests that this Court deny the State of California's petition for writ of certiorari seeking review of the unpublished opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One, and submits the following as his Brief in Opposition.

INTRODUCTION

Petitioner, the People of the State of California, seeks a writ of certiorari in this Court to overturn a decision of the Court of Appeal of the State of California, Fourth Appellate District, Division One, declaring a custodial interrogation undertaken by investigating police offices to have been conducted in violation of respondent's Fifth Amendment *Miranda* rights; i.e., respondent having been deprived of his freedom in a meaningful manner, interrogating police officers failed to advise him of his constitutional right to remain silent, that any statement he made might be used against him, and that he had a right to the presence of an attorney, either retained or appointed.

STATEMENT OF THE CASE

Respondent concurs with petitioner's presentation of the Statement of the Case appearing at pages 3 through 5 of the petition for writ of certiorari.

STATEMENT OF THE FACTS

A. INTRODUCTION.

The following statement of facts is taken from the Reporter's and Clerk's Transcripts of the trial court proceedings. Because the facts of respondent's case have been fairly and accurately presented by the Court of Appeal in its opinion, respondent's statement of facts will in large part track, but not mirror, the statement of facts as outlined by the Court of Appeal, Fourth Appellate District, Division One, in its unpublished opinion of December 20, 1993.

B. FACTUAL OVERVIEW.

Luis Coronado's June 29, 1991, killing was the result of rivalry and animosity between the Logan Heights Calle Triente (Calle Triente) and the Old Town National City (OTNC) street gangs. The killing apparently followed an altercation that took place earlier that same evening between several OTNC members and two Calle Triente members in a 7-Eleven store in National City. Respondent, a 19-year old Mexican boy with no prior police record, was convicted of second degree murder, having been found to have been the driver of the car that was allegedly involved in both incidents. The accused shooter, having been declared incompetent to stand trial, has not yet been tried.

C. THE ANTECEDENT ALTERCATION AT THE 7-ELEVEN.

OTNC gang members 16-year-old Enrique Diaz (Diaz) and 15-year-old Rudy Cedano (Cedano) testified that at about 10:00 or 10:30 p.m. on June 28, 1991, they drove, with Miguel Mejia, another youth and two girls, to the 7-Eleven store at 24th and Highland in National City where they planned to steal some beer. (RT 335.) Diaz and Cedano said that while they were leaving the store, two members of the Calle Triente gang walked in. (RT 290, 296.) When the Calle Triente members entered the store, the two groups mutually "claimed," words were exchanged, and an altercation ensued. The one Calle Triente boy ran to his blue Monte Carlo, jumped in and started the car. (RT 293, 297.) Meanwhile, the driver's companion attempted to get into the car, but he was repeatedly hit by the two OTNC members while trying to do so. (RT 291, 297, 313.) He ultimately stumbled into the car, as the OTNC boys were slamming the door on his leg and kicking at the car door. (RT 291, 297.) The driver then put the car into reverse, nearly running Diaz over. (RT 338.)

Although Diaz and Cedano each participated in a photographic lineup a few days after the 7-Eleven altercation, neither was able to recognize any of those individuals (including respondent) as the driver of the car. (RT 328, 846-847.) Diaz did, however, identify respondent's car at the police station impound lot and then at respondent's trial, after some equivocation, positively identified respondent as the driver of the car in question. (RT 323, 324, 327, 621.)

Similarly, Cedano also was unable to pick respondent's picture out of the photo lineup several days after the incident, but he then, too, identified respondent as the driver of the car during direct examination at respondent's trial. (RT 349, 350, 368, 846-847.) Although Diaz, like Cedano, was unable to recognize respondent's car in a photo lineup shown him shortly after the incident, he later identified respondent's car when shown it at the National City police station. (RT 341.)

In addition to eliciting testimony concerning the 10:00 p.m. altercation at the 7-Eleven store, the prosecution introduced evidence as to a mysterious second altercation that evening just two hours later at the same 7-Eleven store. This incident involved a fact scenario remarkably identical to that of the first altercation, albeit allegedly with different gang members.

Former Calle Triente gang member Javier Aguirre (Aguirre) testified for the prosecution that at about 12:00 a.m. that evening he and Calle Triente member Jerry Ortega (Ortega) drove in Aguirre's 1983 blue Monte Carlo to that same 7-Eleven store to buy alcohol. (RT 216.) He said that inside the store Ortega started a fight with some OTNC gang members, who then chased Ortega to the car, hitting him as he tried to enter it. Aguirre said he then tried to run over the OTNC boys with his car. (RT 219.)

Aguirre testified that he and Ortega then drove to Memorial Park, where he saw Pimentel with Felipe Juarez (Juarez) and watched Juarez put something in the waistband of his pants. Aguirre said Pimentel and Juarez soon left together in Pimentel's 1979 blue

Monte Carlo and returned again at about 1:00 a.m. (RT 252, 258, 271, 273.)

D. THE SHOOTING.

19-year-old OTNC member Eddie Bellot (Bellot) and fellow OTNC member Gabriel Mejia testified that on the night of the killing they were hanging out with 18-year-old Luis Coronado (Coronado) at the corner of Coolidge and 16th Streets in National City. They said that at about 12:30 to 12:45 a.m. a blue Regal or Monte Carlo pulled up. A passenger got out, walked to the rear of the car and asked Bellot and the others where they were from. (RT 380, 396, 452, 453.) They replied, "OTNC," heated words were exchanged, and Bellot and Coronado then walked toward the Calle Triente boy expecting to fight. (RT 385, 455.) However, when the approaching boy pulled a gun from under his shirt, Bellot and Coronado began running and shots were fired. (RT 386, 521.) Bellot said he heard Coronado call his name and when he turned around, Coronado was lying on the ground and the car and shooter were gone. (RT 386.) Coronado died at the scene from multiple gunshot wounds. (RT 521.)

National City Police Detective Craig Boegler (Boegler) issued a bulletin to law enforcement agencies describing the car in which the shooter was seen riding as a 1978-1979 blue two-door Monte Carlo, believed to be driven by a Calle Triente member. Because respondent owned a car similar to that described by the OTNC gang members, he was stopped by police officers several times prior to his ultimate arrest, on one occasion by some eight police cars. (RT

63-64.) On July 3, 1991, some five days after the shooting, for example, respondent was stopped by an officer of the National City Police Department, who also searched his car at the time of the stop. (RT 524.) Approximately two weeks later, on July 18, 1991, an officer of the La Mesa Police Department stopped respondent and took pictures of his car. (RT 588-589.) The very next day, respondent was again stopped by officers of the La Mesa Police Department and again pictures were taken of his car. (RT 598.)

On July 29, 1991, after Diaz identified Pimentel's car from a photograph as the one he had seen at the 7-Eleven store on June 28, Boegler and district attorney's office investigator Robert Marquez (Marquez) went to Pimentel's place of employment and took more photographs of his car. (RT 620.) When Pimentel came out and asked what they were doing, they explained that his car matched the description of the one involved in the shooting. (RT 623.)

Pimentel thereupon agreed to go to the National City police station to talk with Boegler and Marquez. However, because Pimentel had very little gasoline in his car, Boegler and Marquez followed him to his home, where he left his car and then rode with them to the police station. (RT 623.) Once there, they told Pimentel he was free to leave at any time. (RT 61.)

At the police station Boegler and Marquez began interviewing Pimentel. During the ensuing interview, respondent initially denied any gang involvement as well as all participation in the alleged 7-Eleven altercation. (RT 624.) After about one and one-half to two hours of discussion, however, Boegler falsely told

Pimentel that he had been videotaped inside the 7-Eleven store, that his car had been videotaped in the parking lot of that same store and that they had eyewitnesses who had identified him as being there. Confronted with the claim of such overwhelming evidence against him, Pimentel agreed he had been at the store and that his passenger had been in an altercation with OTNC members. (RT 73-75, 89-90 108, 624, 645.) Boegler then advised Pimentel of his *Miranda* rights, which Pimentel waived.

During the taped interview that then followed, Pimentel first stated that on the evening of June 28, he and Christian Gonzales (Christian) had driven to the 7-Eleven store, where Christian had become involved in a fight. (Supp. RT 51.)[2] Pimentel said he then drove to Memorial Park, dropped off Christian and his brother Juan, and then drove home. (Supp. RT 62.) He later changed his story, saying Juarez and Joe Ayala (Ayala) had also been in the car. (Supp. RT 69.) Pimentel then denied either of these accounts was true and claimed he had not been involved at all. (Supp. RT 76-77.)

Upon persistent demands that he come forth and tell the truth, which, the officers stated, they already knew, Pimentel then said he had driven to the scene of the shooting with Christian and Juan, where Christian had fired at a group of friends. (Supp. RT 84.) Pimentel then retracted this story, stating he had been at the 7-Eleven but had not been involved in the shooting. (Supp. RT 92.) At this point Boegler arrested Pimentel for the murder of Coronado.

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[2] "Supp. RT" in this response refers to the Clerk's Supplemental Transcript, Volume 1, containing the transcript of appellant's two taped interviews.

(Supp. RT 92.) Pimentel continued to insist, however, that he had not been involved in the shooting nor did he know who had been. (Supp. RT 96.)

Boegler and Marquez interviewed Pimentel again the following day, at the outset of which Pimentel was falsely told that Christian and Juan had contradicted what he had said the day before and that they, in fact, had "fingered" him as the driver. (Supp. RT 99, 102.) Pimentel again waived his *Miranda* rights and the subsequent interview was taped. During this interview Pimentel said that on the evening of June 28th, he and Juarez had fought with some OTNC members at the 7-Eleven, then drove to Memorial Park, where Juarez retrieved a gun from a hiding place, and then returned to National City. (Supp. RT 102-103, 110-115, 118.) There, they saw a group on a street corner, whereupon Juarez made a gang sign and got out of the car. Pimentel said he then heard gunshots and saw Coronado fall; Juarez jumped into the car and the two drove back to the park. (Supp. RT 126-129, 134, 147.)

Bellot and Gabriel Mejia identified Juarez as the shooter and they also identified Pimentel's car as the one in which the shooter had been riding as well.[3] (RT 392.) At trial, however, Pimentel denied having driven the car involved in the shooting. (RT 1853, 1857.) In his defense, he testified that on the night of the

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[3] Juarez was arrested for Coronado's murder and joined with Pimentel as a codefendant. However, at the time of Pimentel's trial, criminal proceedings against Juarez had been suspended under California Penal Code section 1368. The prosecution's motion to continue Pimentel's case until Juarez's competency could be established was denied by the trial court. Coronado still remains incompetent to stand trial at this time.

shooting he left work around 9:30 p.m. and went home. (RT 1809.) Other members of his family verified that he had spent the entire night at home with them, where they were preparing to celebrate the birthday of the family's oldest son the following day, a significant tradition with this particular family. (RT 696-672, 978-980, 1003-1007, 1011-1019, 1025-1036, 1745-1747, 1755, 1773-1776, 1788.)

In addition, Pimentel testified that during the police interview he had felt pressured and merely told Boegler and Marquez what he thought they wanted to hear. (RT 1880, 1949-1951, 1969.) He explained he had agreed with Boegler's and Marquez's version of events because they led him to believe if he did not cooperate he would face a lengthy sentence, whereas if he said what they wanted to hear his sentence would be only four or five years. (RT 1881-1882, 1909, 1955-1956.)

The jury found Pimentel guilty of second degree murder and further found he had been armed with a firearm. (CT 40-41, 135, 165, 168.) The trial court sentenced him to fifteen years to life for the murder conviction and to one year for being armed with a firearm. (CT 170; RT 1529.)

REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE.

Contrary to petitioner's representation, the California Court of Appeal's decision in *Pimentel* determining "in custody" for purposes of *Miranda* advisements is not in conflict with decisions of this Supreme Court and most definitely is not in conflict with this Court's recent *Miranda* decision in *Stansbury* v. *California* (_____ U.S. _____ (April 26, 1994) (62 U.S.L. Week 4279). On the contrary, in casting the issue presented by *Pimentel* as being the Court of Appeal's improper consideration of the police officers' "subjective beliefs," petitioner misleadingly misframes the determinative circumstances upon which the Court of Appeal's opinion was actually based. In fact, the California court's opinion that respondent's Fifth Amendment rights had been violated did not rest upon the subjective views of the interrogating officers at all, but rather on the fact that the investigating officers had demonstrably "disclosed" their suspicions to respondent, "disclosed" being the operative term for the court's holding.

Petitioner contends that the *Pimentel* decision is in conflict with this Court's recent decision in *Stansbury* v. *California, supra*. But not only is this not true, the *Pimentel* decision is solidly supported by *Stansbury* itself. Indeed, in correctly arguing that *Stansbury* prohibits a trial court from considering whether a respective investigation has focused on the defendant, petitioner disregards the operative caveat to this Court's *Stansbury* discussion, namely that it is the **undisclosed** suspicions

of police interrogators that are irrelevant to the question of "in custody." As this Court in *Stansbury* noted: "Our cases make clear, in no uncertain terms, that any inquiry into whether the interrogating officers have focused their suspicions upon the individual being questioned (**assuming those suspicions remain undisclosed**) is not relevant for purposes of *Miranda*." (*Stansbury* v. *California*, *supra*, 62 U.S.L. Week, at p. 4281; emphasis added.)

In fact, this Court repeatedly emphasized throughout its opinion in *Stansbury* that -- in this Court's own words -- although an "undisclosed" subjective view is irrelevant, a "disclosed," "communicated," "articulated," "otherwise manifested," "somehow manifested," suspicion that is "conveyed, by word or deed to the individual being questioned," is a most relevant consideration to the "in custody" question. Inexplicably overlooked by petitioner is that what was determinative for the California Court of Appeal in finding that a reasonable person in respondent's position would not have felt he was at liberty to leave the interrogation was not that the officers subjectively suspected petitioner of the homicide, but rather that the officers had communicated that suspicion to Pimentel in no uncertain terms. (Opinion, at pp. A-16-18.)[4]

The Court of Appeal found Pimentel to have been in custody for purposes of *Miranda* at that point when the interrogators informed

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[4] References to the Court of Appeal's opinion will be to the pagination as contained in Petitioner's "Appendix A" in its "Appendices to Petition for Writ of Certiorari," which accompanies petitioner's Petition for Writ of Certiorari, the page numbering there differing from that of the court's opinion itself.

him they had hard, irrefutable evidence that he was involved in the homicide in question. To be sure, determinative for the Court of Appeal, as it itself emphasized, was that the officers told Pimentel, albeit falsely, they had a videotape of him in the altercation in the 7-Eleven, they had a videotape of his car in the parking lot of that same 7-Eleven, and they had eyewitnesses who had positively identified him as having been at this 7-Eleven. (Opinion, at pp. A-17-18.)

Contrary to petitioner's presentation, the officers themselves may not have subjectively considered respondent a strong suspect at that time, nor did the Court of Appeal so hold, a fact that serves to reinforce that the officer's subjective beliefs were not a consideration to the Court of Appeal. Indeed, it was not what the officers believed but rather what they communicated to Pimentel that was determinative for the Court of Appeal, and what the officers effectively told Pimentel was that they had solid evidence that he was involved in the murder. It was only upon being given such information that the Court of Appeal believed a reasonable person, being told there was irrefutable evidence that he was a participant in a murder, would, at that point, not have believed himself free to get up and leave the interrogation. At that point, the Court of Appeal held, respondent was in custody and the advisement of his constitutionally mandated *Miranda* rights was required. (Opinion, at p. A-18.)

Finally, the court did not error in finding the subsequent *Mirandized* statements to have been tainted by the

unconstitutionality of the non-*Mirandized* admissions, in that the court found the second interrogation to have been one continuous interrogation, inextricably connected to the first, with no attenuating break in the chain of causation. (Opinion, at p. A-19.) The court's holding on this aspect is fully supported by state law as well as federal law.

ARGUMENT

I

THE CALIFORNIA REVIEWING COURT PROPERLY RECOGNIZED THAT INTERROGATING OFFICERS' "DISCLOSED" SUSPICIONS ARE A PROPER CONSIDERATION IN DETERMINING CUSTODIAL INTERROGATION FOR PURPOSES OF *MIRANDA*.

Respondent would note preliminarily that he does not take issue with petitioner's general presentation of the relevant law as to when "in custody" becomes operative for purposes of *Miranda* advisements. The law as outlined by this Court is, of course, clear. The short answer to petitioner's presentation is simply that it does not apply to respondent's case here.

The thrust of petitioner's argument is that respondent's case is on all fours with this Court's recent case of *Stansbury* v. *State of California* (_____ U.S. _____ (April 26, 1994) (62 U.S.L. Week 4279. (Petition, pp. i, 7, 23-24), in which this Court reiterated that the subjective beliefs of interrogating Officers are irrelevant as to whether a reasonable person would believe his freedom were restricted. Although petitioner inaccurately represents respondent's circumstances as being similar to those in *Stansbury*, reference to this Court's recent discussion in *Stansbury* is helpful because that discussion unequivocally demonstrates why the Court of Appeal's *Pimentel* opinion is consistent with this Court's line of "in custody" decisions. To be sure, respondent welcomes a *Stansbury* analysis, for the facts of *Stansbury* and those of his own case are dramatically distinguishable.

In *Stansbury*, it will be recalled, Lieutenant Johnston was interviewing defendant at the police station and began to suspect

defendant was the murderer of young Roby Jackson when Stansbury "volunteered" that he had left his home about midnight on the evening in question in a borrowed turquoise car. Johnston became suspicious, because a witness had seen the victim thrown from a turquoise car in the early morning hours. Importantly, Johnston did not communicate to defendant that he had cause to be suspicious, but simply asked an additional question. On review, this Court held that Johnston's "undisclosed" suspicions were irrelevant to the question of whether defendant felt his freedom was restricted. The relevant consideration, rather, was the "compulsive" nature of the interrogation. (*Stansbury* v. *California*, *supra*, U.S.L. Week at pp. 4280-4281.)

In the case *sub judice*, by way of contrast, the interrogating officers themselves did not necessarily consider respondent a suspect. To be sure, what distinguishes *Stansbury* from *Pimentel* is that the officers in our case communicated in unequivocal terms their belief to respondent that he was a suspect, indeed, the suspect. Determinative for the California court, in its own words, was, contrary to petitioner's representation, not what the officers believed, but rather **what they said to respondent** concerning what they believed. (Opinion, at pp. A-16-18.) The court found the interrogation to have become "compulsive" when the two officers attempted to elicit a confession from Pimentel. Although Pimentel had steadfastly denied being a gang member or having been involved in the 7-Eleven altercation, the officers falsely told him that they had a videotape of him inside the 7-Eleven, they had a

videotape of his blue Monte Carlo (with a dent) in the 7-Eleven parking lot, and they had eyewitnesses who had identified him as having been there. (Opinion, at p. A-17; RT 74, 89-91, 108, 1999, 2038-2039.)

It was at this point, and only then, that the Court of Appeal found that the "interrogation became focused" and would have caused a reasonable person in Pimentel's situation to have believed he was not free to leave, having just been told the government had irrefutable evidence of his involvement in the homicide.[5] (Opinion, at pp. A-18.)

The Court of Appeal properly stated that the ultimate issue to be decided was "how a reasonable man in the suspect's position would have understood the situation." (Opinion, at p. A-13; citing *Berkemer* v. *McCarty* (1984) 468 U.S. 420, 442.) In applying this test, the Court of Appeal acknowledged that even though respondent's car had been stopped by police officers on three different occasions previous to the incident under consideration, respondent had voluntarily accompanied the officers to the police station and was told upon arrival he could leave at any time. The interview up to that point, the court stressed, was therefore non-custodial, and remained so during the more casual portion of that interview. (Opinion, at pp. A-15-16.)

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[5] Respondent respectfully submits that there is a significant difference from stating that the defendant was "the focus of the officer's suspicions" and "the interrogation became focused." To be sure, it is the fact that an interrogation becomes focused [the officers in our case attempting to elicit an admission] that gives a suspect cause to worry, thereby making the situation compulsive.

The nature of the interview changed, however, the California court expressly concluded, when the interrogation became much more focused and respondent was told by the officers they had significant, if not conclusive, proof of his involvement in the homicide. Concluding that the officers were attempting to extract a confession from respondent with their false information, the court held that a reasonable person in Pimentel's situation would have understood his freedom of movement had become so restricted to have constituted custody. As the Court of Appeal explained:

> "The crucial shift in questioning in our opinion came when the officers commenced falsely advising Pimentel that they had a videotape of his car at the store on June 28. At this point we believe Pimentel ceased to be simply a source of general information, or even one of several leads, and became the focus of the investigation. It is difficult for us to believe that the officers would commence telling Pimentel falsehoods which directly linked him to the crime if they were not at that point endeavoring to extract a confession or admission from him. (Citation)
>
> "The *Miranda* warning was not given until after this focused interrogation was commenced; it was not given until after the officers had gotten Pimentel to admit he was at the 7-Eleven during the fight with the OTNC members. After reviewing the totality of the circumstances, as directed in *Boyer* (i.e., the setting at the police station, the one and one-half to two hours of interrogation before the *Miranda* advisement was given, and the use of false information to elicit an admission (fn. 4, *ante*))[6] we conclude a reasonable man in Pimentel's situation would have understood his freedom of movement had become so restricted that he was "in custody." The interrogation became custodial before Pimentel was advised of his *Miranda* rights." (Opinion, at pp. A-17-

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[6] None of the mentioned circumstances, it should be pointed out, was that the officers had subjectively focused upon respondent as a suspect.

18.)

It is clear, then, that the Court of Appeal considered it determinative that the officers communicated not merely their suspicions that he was involved in the murder, but that they informed him they had proof positive of his participation. And it is precisely this aspect of *Pimentel* that brings it directly under the coverage of *Stansbury* and progeny, for throughout its *Stansbury* opinion, this Court stressed that a "communicated" suspicion is indeed a consideration as to whether a suspect is "in custody." As this Court in *Stansbury* pointed out, an officer's subjective suspicions are irrelevant for purposes of *Miranda*, "assuming," that is, that "those suspicions remain undisclosed." (*Stansbury* v. *California* U.S.L. Week at p. 4281.) It flows from this, then, that the nature of an otherwise non-custodial interrogation changes as interrogating officers convey their suspicions to the person being questioned, which, as noted above, is Pimentel's case exactly.

In emphasizing that its prior decisions have hinged on the "compulsive" aspect of custodial interrogation, this Court in *Stansbury* pointed out, as an example, that the motorist in *Berkemer* v. *McCarty*, *supra*, 468 U.S. 420 was not in custody even though the traffic officer "apparently decided as soon as [the motorist] stepped out of his car that [the motorist] would be taken into custody and charged with a traffic offense." The reason, this Court explained, "was that the officer 'never communicated his intention to' the motorist during the relevant questioning." (*Stansbury* v. *California* U.S.L. Week at. p. 4280.) Importantly,

this Court emphasized, "[t]he lack of communication was crucial, for under *Miranda* '[a] **policeman's unarticulated plan** has no bearing on the question whether a suspect was "in custody" at a particular time'; rather, 'the only relevant inquiry is how a reasonable man in the suspect's shoes would have understood his situation.'" (*Stansbury* v. *California* U.S.L. Week at 4280; citing *Berkemer* v. *McCarty*, *supra*, (1984) 468 U.S. 420, at 442; emphasis added.) Accordingly, the **communication** of suspicions, or the lack thereof, is a critical, if not determinative, factor in the "in custody" question. Indeed, it is an emphasis that appears throughout the entire *Stansbury* opinion as a recurring leitmotif.

Reiterating that it is the "uncommunicated" suspicions, in contrast to "disclosed suspicions," that are irrelevant to this issue, the Court in *Stansbury* noted:

> "It is well settled, then, that a police officer's subjective view that the individual under questioning is a suspect, **if undisclosed**, does not bear upon the question whether the individual is in custody for purposes of *Miranda*. . . . The same principle obtains if an officer's **undisclosed** assessment is that the person being questioned is not a suspect. . . . **Save as they are communicated or otherwise manifested to the person being questioned**, an officer's evolving **but unarticulated suspicions** do not affect the objective circumstances of an interrogation or interview, and thus cannot affect the *Miranda* custody inquiry." (*Stansbury* v. *California* U.S.L. Week at p. 4280; emphasis added.)

Expressly making respondent's point, this Court then continued on to reason that:

> "[a]n officer's knowledge or beliefs may bear upon the custody issue **if they are conveyed, by word or deed, to the individual**

> **being questioned."** (*Stansbury* v. *California* U.S.L. Week at p. 4280.)

Stansbury then concluded by explaining that even an officer's communicated suspicions will not in and of themselves be determinative, but nevertheless are a factor to be considered:

> "The weight and pertinence of any communications regarding the officer's degree of suspicion will depend upon the facts and circumstances of the particular case. In sum, an officer's views concerning the nature of an interrogation, or beliefs concerning the potential culpability of the individual being questioned, may be one among many factors that bear upon the assessment whether that individual was in custody, but only **if the officer's views of beliefs were somehow manifested to the individual under interrogation** and would have affected how a reasonable person in that position would perceive his or her freedom to leave." (*Stansbury* v. *California* U.S.L. Week at p. 4280; emphasis added.)

Respondent's case here is directly on point with *Stansbury's* repeated caveat to the "focus" discussion, i.e., the "manifestation" to the suspect of the interrogators' suspicions. The California Court of Appeal found that the officers in its case did, in fact, communicate strong suspicions to Pimentel. The Court of Appeal, therefore, considered these communications in the precise light mandated by *Stansbury*, and decided that the communicated suspicions did affect whether a reasonable person in Pimentel's position would have perceived his freedom to leave to have been restricted. The California Court concluded that in light of the totality of the circumstances, a reasonable person would not have felt himself free to leave, and accordingly held that Pimentel

was thus in custody for purposes of *Miranda* advisements. (Opinion, at p. A-18.)

For his part, respondent would add that the California court's conclusion was correct, for certainly no reasonable person -- having been stopped by police officers on three different occasions in regards to a homicide, being told that his car matched the one used in the homicide, and being told during a lengthy interrogation at a police station that police had videotapes contradicting his denials and verifying his participation -- would have felt free to leave, and certainly not a nineteen-year old minority youth. It would not be reasonable for a young Mexican boy to believe that after being told by police officers they had conclusive proof he was a murderer, he could then simply get up and freely leave the police station.

ARGUMENT

II

THE TRIAL COURT'S RULING THAT RESPONDENT'S POST-*MIRANDIZED* ADMISSIONS AND CONFESSION WERE THE PRODUCT OF THE INITIAL PRE-*MIRANDA* CUSTODIAL INTERROGATION AND WERE THUS IMPROPERLY ADMITTED WAS CORRECT UNDER BOTH CALIFORNIA AND FEDERAL LAW.

Contrary to petitioner's assertion that the *Pimentel* court ruled contrary to federal law when it held respondent's subsequent *Mirandized* statements to have been tainted by his earlier non-*Mirandized* statements, the California court's opinion is thoroughly consistent with federal law. To be sure, *Pimentel* falls squarely under this Court's decision in *Oregon* v. *Elstad* 470 U.S. 298 (1985), for the California Court of Appeal concluded that respondent's second set of statements was inextricably connected with the first set of statements, the latter statements being but part of one continuous interrogation, occurring in the same general location, conducted by the same officers and having been virtually uninterrupted in time. (Opinion, at p. A-19.)

The first interrogation, which, the Court of Appeal held, wrongfully produced non-*Mirandized* admissions, terminated with respondent's arrest at 10:48 p.m., approximately six hours after the police station interview began. The same two officers then interrogated respondent once again the very next day in the San Diego County jail. The Court of Appeal held the statements made by respondent at this second interview were but a continuation of the first interview, there having been no discernible break in the chain of causation. (Opinion, at p. A-19.)

Petitioner impliedly argues that the Court of Appeal's opinion

took no cognizance of the California Supreme Court's ruling in *People* v. *May* (1988) 44 Cal.3d 309, which held that article I, section 28, subdivision (d) of the California Constitution eliminated judicially created state remedies for violation of self-incrimination rights that are not federally compelled. (Petition, at p. 35.) This, however, is not a fair appraisal of the California court's opinion. Indeed, the Court of Appeal's opinion expressly draws on one of our State Supreme Court's most recent discussions of "post non-*Mirandized*" admissions, namely *People* v. *Sims* (1993) 5 Cal.4th 405, thereby demonstrating its familiarity, as well as its compliance, with current state law. (Opinion, at p. A-19.)

In *Sims*, the California Supreme Court noted without objection the long-standing state rule that a subsequent confession may be presumed to have been tainted by an earlier non-*Mirandized* confession:

> "Previous decisions have acknowledged that where -- as a result of improper police conduct -- an accused confesses, and subsequently makes another confession, it may be presumed the subsequent confession is the product of the first because of the psychological or practical disadvantages of having '"let the cat out of the bag by confessing."' [Citations.]." (*Id.* at 444-445.)[7]

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[7] As even the State of California itself in its petition points out, "the fifth amendment prohibits the use only of *compelled* testimony, and failure to administer *Miranda* warnings **creates a presumption of compulsion**, requiring exclusion of the non-*Mirandized* statements. (Petition, at p. 33; citing *Elstad*, *supra*, at pp. 306-307; emphasis added.)

Accordingly, even under *Elstad*, the presumption of taintedness exists and to this degree, California law is wholly consistent with federal law. That presumption can, of course, be rebutted, as the Court of Appeal in *Pimentel* implicitly recognized by its reference to *People* v. *Sims*, *supra*, (1993) 50

Having acknowledged the presumption, the California Supreme Court then added the caveat that it does not however follow that such confessions may be "perpetually" precluded; i.e., confessions given after the circumstances for which the rule was created have ceased to exists will no longer be tainted:

> "Notwithstanding this presumption, 'no court has ever "gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed."' [Citations.]" (*Ibid.*)

The Supreme Court in *Sims* thus concludes that "the foregoing presumption of taintedness is rebuttable, with the prosecution bearing the burden of establishing a break in the causative chain between the first confession and the subsequent confession." (*Ibid.*) Accordingly, the California Supreme Court holds, California requires that where a *Mirandized* statements follows a unlawful non-*Mirandized* statement, the government must demonstrate that there was a break in the causative chain between the two statements. Importantly, this is precisely the analysis undertaken by the *Pimentel* court and in doing so it found that the government had failed to meet this burden. On the contrary, the Court of Appeal in respondent's case held that there was no break in the causative chain:

Cal.4th 262. The Court of Appeal in *Pimentel*, however, found that the presumption had not been rebutted, for, it held, the subsequent *Mirandized* admissions were part of but one continuous, uninterrupted interrogation. In so finding, the Court of Appeal's holding is in line not only with California state law, but with federal law as well. Petitioner's claim to the contrary is insupportable.

> "The admissions and confessions which followed Pimentel's initial admission to being present at the 7-Eleven during the altercation that evening were inextricably connected to the first admission. The statements during the first day's taped interview were part of the same continuous interrogation conducted at the came location by the same officers. The second day's interview was but a continuation of the first. The taped post-*Miranda* admissions and confession were the product of the initial pre-*Miranda* custodial interrogation and were improperly admitted." (Opinion, at p. A-19.)

The Court of Appeal's opinion, therefore, petitioner's assertion to the contrary notwithstanding, is entirely consistent with this own Court's directives in *Elstad*, for there this Court likewise declared that the failure to administer *Miranda* warnings "creates a presumption" of compulsion, requiring exclusion of non-*Mirandized* statements. (*Oregon* v. *Elstad*, *supra*, 470 U.S. at 306-307.)

Furthermore, the analysis undertaken by the Court of Appeal in respondent's case here has been held by other California decisional authority to mesh squarely with the federal standard as specifically outlined by *Elstad*. In *People* v. *Celaya* (1987) 191 Cal.App.3d 665, for example, a noted California Court of Appeal decision, the court dealt with facts nearly identical to those of our case here and analyzed them under both the state and federal standard. Importantly, its analysis was the near mirror image of the *Pimentel* court's.

In *Celaya*, the defendant was read and then waived his *Miranda* rights immediately after making a non-*Mirandized* admission. The

court acknowledged that under federal law a subsequent warned statement is deemed not tainted by the uncoerced, unwarned statement. (*Id.* at 673.) Distinguishing the circumstances of *Elstad*, however, the Court of Appeal noted that the *Elstad* Court held that the circumstances in its case "had none of the earmarks of coercion . . . [n]or did the officers exploit the unwarned admission to pressure respondent into waiving his right to remain silent." (*Id.* at 674; citing *Oregon* v. *Elstad* (1985) 470 U.S. 298, at 316.) The *Celaya* court also noted that "[t]he *Elstad* court limited its holding to the failure to administer *Miranda* warnings 'unaccompanied by an actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will . . . ." (*Id.* at 674; citing *Oregon* v. *Elstad*, *supra*, at p. 309.) The Court of Appeal in *Celaya* then concluded that even under the federal *Elstad* standard, the second admission was tainted and thus inadmissible; the *Mirandized* statements were tainted under either standard.

Significantly, the *Celaya* court's "federal" analysis is indistinguishable from the analysis undertaken by the *Pimentel* court. Just as in *Pimentel,* the *Celaya* court found the *Mirandized* statements to have been tainted by the first non-*Mirandized* admissions because:

> "In the instant matter, the second statement unquestionably flowed from and was inextricably connected with the first statement. The statements were part of a continuous interrogation occurring at the same location, conducted by the same officer, and uninterrupted in time." (*Ibid.*)

As noted, the Court of Appeal's analysis in *Pimentel* was virtually identical in reasoning and thus the *Pimentel* court cannot be said to have ruled contrary to federal law, unless, of course, the holding in *Celaya* was incorrect.

Moreover, respondent's case here can be distinguished further from the situation in *Elstad* in that respondent's non-*Mirandized* admissions, in contrast to those considered by this Court in *Elstad*, can by no means be characterized as uncoerced. To be sure, *Elstad* holds that where a first admission is obtained through coercion or "other circumstances calculated to undermine the suspect's ability to exercise his free will," the subsequent *Mirandized* admissions will be tainted: "It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period." (*Oregon* v. *Elstad*, *supra*, at p. 309.)

The Court of Appeal in *Pimentel*, by way of contrast, held that what brought respondent under the coverage of *Miranda* in the first place was the interrogating officers' lies communicated to him that they had videotapes of him and his car at the 7-Eleven and that they also had eyewitnesses who had positively identified him as being there. The lies, the Court of Appeal ruled, were clearly an "endeavor[ing] to extract a confession or admission from him." (Opinion, at p. A-17.)

Respondent's case was not, therefore, a case such as *Elstad*, where the defendant simply blurted out unsolicited admissions. On the contrary, the psychological "compulsiveness" in our case could not have been greater. Indeed, why else did the officers tell Pimentel the lies they told if not in a calculated attempt to undermine his free will, which, up to that point in time, had steadfastly denied any and all involvement in the homicide? And, of course, the California Court of Appeal so held -- and correctly so.

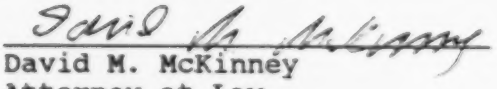
CONCLUSION AND PRAYER

The opinion of the Court of Appeal is a correct decision, properly applying principles of the California and United States Constitutions. It properly sets forth and applies the law in the area of "in custody" for purposes of *Miranda* and appropriately analyzes and resolves the question of whether respondent's non-*Mirandized* admissions tainted his subsequent *Mirandized* admissions.

Because this case presents no issue appropriate for the Court's review and because the lower court's holding was not in error, this Court should deny petitioner's Petition for Writ of Certiorari.

Dated: June 17, 1994

Respectfully submitted,



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IN THE SUPREME COURT OF THE UNITED STATES

FALL TERM, 1994

STATE OF CALIFORNIA, Petitioner

v.

GUSTAVO PIMENTEL, Respondent

RESPONDENT'S RESPONSE TO PETITIONER'S

PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

I, DAVID M. MCKINNEY, a member of the Bar of this Court, hereby certify that on June 17, 1994, a copy of the Response to Petitioner's Petition for Writ of Certiorari in the above entitled case was mailed, first-class postage prepaid, to: Deputy Attorney General Pamela Klahn, California Attorney General's Office, 110 West "A" Street, Suite 1100, San Diego, California, counsel for petitioner herein. I further certify that all parties required to be served have been served.

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